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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

GEORGE HAMMOND,
Petitioner,
v
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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George Hammond, by his attorneys, Ralph H. Richardson and S. Allen Early, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming his conviction on one count of conspiring to possess narcotics with intent to distribute in violation of 21 USC 846.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*) is not yet reported. There was no opinion rendered by the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1976. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

I.

WHERE THERE IS NO DIRECT EVIDENCE OF AGREEMENT OR INTENT BETWEEN THE PETITIONER AND THE OTHER PARTIES CHARGED IN A CONSPIRACY, AND THE ONLY CIRCUMSTANTIAL EVIDENCE PRESENTED TO PROVE THESE ELEMENTS REQUIRES THE PYRAMIDING OF INFERENCE UPON INFERENCE, IS THE PETITIONER DENIED DUE PROCESS OF LAW AS A RESULT OF THE INHERENT VAGUENESS IN THESE SUBSTANTIVE ELEMENTS?

II.

DOES THE EXISTENCE OF A HUB ATTACHED TO UNRELATED SPOKES RESULT IN MULTI-CONSPIRACY WHICH IS FATALLY VARIANT FROM THE CHARGE IN AN INDICTMENT ALLEGING A SINGLE CONSPIRACY?

A. WHERE THERE IS NO CONSPIRACY-RELATED ACTIVITY BETWEEN THE PETITIONER WHO, IT IS ALLEGED, WAS A RETAILER-"SPOKE" IN A "WHEEL" CONSPIRACY AND ANY OTHER ALLEGED RETAILER-SPOKE, ASIDE FROM MERE ASSOCIATION, DID THE COURT OF APPEALS ACTION IN AFFIRMING PETITIONERS CONVICTION DEPRIVE HIM OF HIS FIFTH AMENDMENT RIGHT TO FAIR TRIAL?

III.

WHERE THE "HUB" OF AN ALLEGED "WHEEL" CONFIGURATION CONSPIRACY TO DISTRIBUTE NARCOTICS IS THE NARCOTICS SUPPLIER AND THE "SPOKES" ARE THE ALLEGED PURCHASERS AND RETAILERS, WITH NO INTER-RELATIONSHIP BETWEEN THEMSELVES, IS THE CONSPIRACY BROUGHT TO AN END WHEN THE HUB BECOMES A GOVERNMENT INFORMANT?

A. DOES THE OCCURRENCE OF THE ARREST OF THE HUB THEN PRECLUDE INTRODUCTION OF ANY EVIDENCE RELATING TO THE PERIOD OF TIME AFTER THE HUB CHANGES ALLEGIANCE?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty or property without due process of law . . ."

The Statute under which Petitioner was convicted is codified in Title 21, United States Code, which provides:

> Section 846. Attempt and Conspiracy
>
> Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The alleged conspiracy related to the illegal object codified in Title 21 United States Code, which provides:

> Section 841. Prohibited acts A-Penalties
>
> (a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

STATEMENT OF THE CASE

(Unless context indicates otherwise, numbers in parentheses followed by the letter "a" refer to the pages of Petitioner's Separate Appendix.)

On April 16, 1974, Petitioner George Hammond and six others were charged in a one count Indictment with conspiring to possess Heroin and Cocaine with the intent to distribute it in violation of 21 U.S.C. Section 846. (3a,10a) There were eleven overt acts enumerated in the Indictment (11,12a). Only one, number 11, mentions the Appellant (12a).

On October 29, 1974, Petitioner was brought to trial with three other defendants: Fred Hammond, Petitioner's brother, who was severed during the trial when he became ill, Millard Thompson, and Sonja Brown (26a). The government's case consisted, for the most part, of Franklin Westbrook's testimony. It was alleged that the conspiracy began when Millard Thompson telephoned Westbrook in California asking him to transport drugs to Detroit (30-36,42a). Franklin Westbrook testified that he obtained drugs from one Clarence Allen in California and transported them to Detroit on February 15, 1974 (35-40a). Westbrook made four or five other trips to Detroit bringing Heroin for sale in which none of the defendants on trial were involved (38,140,214,225a). Westbrook claims to have sold the drugs to George Lowry (40,43,54,162,169a); George Hammond (48,50-52, 174,176,279a) and Fred Hammond (53,177-182, 243a) in separate and distinct transactions. After returning to California (60a), Westbrook claims to have again received individual calls from Detroit from defendants Millard Thompson and Frederick Hammond, asking him to return to Detroit with more drugs (61-65,250a), but no one knew he was coming (201,237,278,289a). Westbrook again obtained some drugs from Clarence Allen (who was subsequently acquitted of conspiracy) and travelled to Detroit on February 21, 1974. He was arrested at the Airport while in possession of the drugs (38-40,70-72,120, 138,197-198,203,252-254,319,321,325-337,345-351,378a). These drugs were confiscated from Westbrook and remained thereafter in the possession of the narcotic agents (125,128,328a). Westbrook agreed some short time thereafter to cooperate with the Drug Enforcement Administration (73,74,204-207,257-259,348a) and placed a number of phone calls, monitored by narcotics agents,

(74,91-92,290-293,297a) to Millard Thompson and Frederick Hammond, and these calls were taped (13-26,74-76,87-92,259,325,435-443a). Petitioner George Hammond was arrested in a motel room rented by Drug Enforcement Agents (210,291,305-306a) when he appeared at the same time Millard Thompson and Sonja Brown came to said room, and, in the presence of a narcotic agent posing as a bodyguard for Westbrook with other agents nearby (211,313a), expressed an interest in buying drugs (92-94,100-105,126,212,298a).

Apparently, the conversation of George (BO) Hammond with Westbrook was of Hammond's dissatisfaction with the previous purchase (93-94,101a). Witness Westbrook at first could remember no other conversation but, under prodding, quoted George (BO) Hammond as saying "he could handle two ounces . . .," and made no other statement of offer to purchase or show of money (95,102a).

Petitioner's brother, Fred Hammond, had been to the same motel room earlier and had already been arrested (106-119,293-295,297,307,379,382a) in a totally unrelated transaction.

No other facts connected Petitioner with any of the other named Defendants (270a). Nothing suggests any knowledge on his part of the plans of the other Defendants and Westbrook never spoke to him on the telephone (231,270a).

Petitioner was found guilty as charged by a jury. On January 17, 1975, he was sentenced to 18 months in jail with a special three year parole to follow.

Appeal was duly taken to the Sixth Circuit Court of Appeals and on April 22, 1976 that Court affirmed Petitioner's conviction in the above mentioned Opinion.

REASONS TO GRANT THE WRIT

I. CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT

A. Pyramiding Inference Upon Inference to Produce Elements

Complaints about the scope of conspiracy law as it has developed in the federal system have been numerous and have come from varied sources. All agree on a certain common denominator of objection; the vagueness of the evidence permitted to prove the elements of the charge. Some Circuits, notably the Second Circuit, have attempted to restrict the boundaries of the permissible evidence and have not allowed the vast range of inference that others, such as the Sixth, condone.

The instant case is a common example of the point reached in the devolution of this inchoate crime. Originally, it was designed as a useful anticipatory or preventive tool with fairly well-defined and adhered-to elements. The charge of conspiracy has become a dragnet device to ensnare and disadvantage, through the charge of a single conspiracy, defendants who may themselves have purposes related to those of the wider conspiracy charged, but do not manifest the agreement or intent to join that conspiracy, which are the *sine qua non* of the charge.

An examination of each element, the evidence offered to prove it and the ratiocinations of the Sixth Circuit in upholding the proof demonstrate the width and breadth of a doctrine represented by 21 U.S.C. 846 that has grown to envelop at the limit of its logic any criminal action engaged in by two or more persons, whether or not they demonstrate any intent or willfulness to act in concert or ever agree to act toward any common goal.

Directly apropos Question I., the vagueness so engendered has deprived the Petitioner of the notice required by procedural due process.

The crime of conspiracy has been described as consisting of four main elements: (1) an illegal object to be accomplished; (2) a plan or scheme embodying the means to accomplish that object; (3) an agreement or understanding between two or more defendants whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement and (4) an overt act, *U.S.* v *Bostic*, 480 F.2d 965, 968 (C.A.6).

While it is true that direct evidence of intent and agreement is difficult to obtain and therefore not always required where circumstantial evidence is an adequate substitute (Cf. *Direct Sales Company* v *United States*, 319 U.S. 703 (1943)), it is also true that "charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes," *Direct Sales Company, supra*. It is the Petitioner's contention that this impermissible pyramiding of inferences has led to his conviction and made impossible the provision of adequate notice of what acts constitute the crime charged. More practically, it made impossible a preparation of a defense based on knowledge of what proofs might legitimately comprise the evidence of the crime.

As stated above, agreement, intent, knowledge and an act are the keys to a conspiracy. The government and the Sixth Circuit were apparently unwilling to heed this Court in *Direct Sales* and as there was no direct evidence of them, allowed the inference of those elements to be gathered from the prior purchase by Petitioner, his

non-criminal association with two of the alleged co-conspirators and the conversation about the possibility of a second transaction which had been rendered impossible by the government's arrest of the seller. The grave danger inherent in this limitless expansion of permissible inference is trenchantly apparent. The charged individual can never know what actions will be viewed as acceptable "second level" inference material and thus cannot prepare a defense. This is clearly a violation of the most basic tenets of procedural due process.

The ambiguity is in direct contravention of the letter and spirit of the *Direct Sales* opinion. In that case the sale of huge quantities of a controlled substance to a single individual provided a direct inference that the defendant knew of the intended illegal use. The prior lengthy course of dealing and actual inducement addressed personally to the individual allowed the direct inference of knowledge. That he continued to order directly demonstrated agreement.

The evidence in the instant case requires several levels of inference. Most of the government's case concerning the alleged conspiracy was provided by the testimony of Franklin Westbrook, a co-conspirator and not a defendant. If it is assumed, as it must be for the moment, that his statements are true and accurate, the record demonstrates the following: (1) Franklin Westbrook made two trips to Detroit carrying drugs (30-42,61-65,250a); the first, after a call from Millard Thompson (30-36,42a); the second, after individual calls from Millard Thompson and Frederick Hammond (61-65,250a); (2) Franklin Westbrook was arrested at the airport as he arrived in Detroit the second time (38-40,70-72,120,138,197-98,203,252-254, 319,378a); parenthetically, Westbrook had made four or five other drug-selling trips to Detroit prior to the two transactions in this case and none of the defendants on trial were involved (38,140,214,255a); (3)

Petitioner, George Hammond, bought some drugs from Franklin Westbrook the first time Hammond met Westbrook in Detroit (48,50-52,174-176,279a); (4) Petitioner was arrested in a motel room set up by narcotic agents *after* Franklin Westbrook was already under arrest and without ever actually agreeing to purchase anything (102,283,261,335-336a), in spite of having indicated to Westbrook in the motel room that "he wanted two ounces for the present" (299a); and (5) Petitioner is Frederick Hammond's brother and a friend of Millard Thompson.

From these "facts," the Government asks that four inferences be drawn: (1) a conspiracy existed between Clarence Allen, Franklin Westbrook, Millard Thompson, George Hammond, Frederick Hammond and Sonja Brown; (2) the Petitioner, George Hammond, had knowledge of this conspiracy; (3) George Hammond intended to become part of the conspiracy; and (4) George Hammond carried through his intent to join by agreeing to participate in furthering the "common end" of the conspiracy, which the Government tried to prove circumstantially by Petitioner's actions and his personal relationship to two of the other alleged conspirators. Thus, the Government asks that we place inference upon inference by inferring both the *intent* to conspire and the *agreement* to conspire from the first two inferences regarding his actions in purchasing and his relationship to other Defendant's; yet, the evidence provided *no* additional facts from which such inferences could be directly made.

Petitioner asks this Court to enforce the limits set down by its prior decision through constricting allowable inference, as a matter of law, to action which *directly* and reasonably demonstrates agreement (i.e. bribery of an officer to let through a shipment going to another alleged co-conspirator, a lengthy course of dealing, et al.) and the other elements noted above.

B. Charging a Single Large Conspiracy When the Evidence Established, At Most, Several Smaller Conspiracies, thus Prejudicing Petitioner's Trial Rights.

Petitioner contends that he is at least entitled to a new trial because his rights were substantially prejudiced by his inclusion in a single conspiracy trial when, in fact, if any theory of conspiracy may be sustained, it must be that of multiple conspiracies. What distinguishes a single conspiracy from several related ones is a single unified purpose, a "common end." This "common end" is a contradiction in a multiple conspiracy. *U.S.* v *Rosenberg*, 195 F.2d 583, 600 (C.A.2) *certiorari denied*, 344 US 838.

The best evidence of the fact that each of the Defendants had separate ends that were similar in character (as opposed to a common end) comes from the testimony of Franklin Westbrook himself. When asked if each of the Defendants was dealing for him/herself, he replied, yes (262,263,282-283a). That answer provides an apposite analogy to *Kotteakos* v *U.S.*, 382 US 750, which was described well by a later Supreme Court opinion as a case where each separate agreement had its own distinct illegal end. Each transaction was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any other loan except his own went through. Second, none aided in any way in procuring another's loan. The conspiracies therefore were distinct and disconnected, not part of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all comprehensive plan. *Blumenthal* v *U.S.*, 322 US 535, 558.

All of the above is also true of this case. Each sale was separate from the others. Each purchaser was interested only in his or her own buy and had no interest in the other sales. Certainly, Fred Hammond was quite explicit in not wanting to be connected with anyone (13,14,260a). No one aided another in their purchase, and there were no agreements for anyone to aid anyone else in making a purchase. Clearly all their similar ends did not merge into a common, unified goal. At the outside, there was not one grand "wheel" conspiracy, but, on the contrary, many small "hub and spoke" conspiracies.

The fact that only multiple conspiracies could have existed and that Petitioner was tried as though he were part of a single conspiracy created substantial prejudice to Petitioner.

It is obvious that the disadvantages of mass trial and offense to due process are inherently prejudicial to the defendant. The great number of illegal acts that took place furnish such a strong basis for assuming all-inclusive guilt, that it is tempting and indeed natural for those acts to indelibly and prejudicially color the perceptions of any trier-of-fact as to any particular defendant.

That the Petitioner was found guilty in spite of this lack of probative evidence, indicates *prima facie* that prejudice did result.

The above-stated problem has greatly troubled the courts for decades. A narrow path must be trod in differentiating the single from the multiple conspiracy. Especially is this imperative when inferring agreement and intent from circumstantial evidence. A connection must be based on proof of the conspiracy alleged. Where one conspiracy is specifically charged, proof of different

and disconnected ones will not sustain a conviction. *U.S.* v *Bostic*, *supra*, at 968.

Moreover, the evidence indicating a single conspiracy must be clear and convincing. To sustain a conspiracy conviction, the evidence must generate more than a mere suspicion of guilt and when the evidence is equally consistent with both guilt and innocence, the conviction cannot be sustained, *U.S.* v *Butler*, 494 F.2d 1246 (C.A.10). If first principles are not adhered to in this area of the law, it will be a denigration of the entire system of criminal jurisprudence. The Sixth Circuit, in ruling that the evidence could reasonably have led to Petitioner's conviction of the conspiracy charged (Opinion at 7) has not taken cognizance of this fact and Petitioner prays this Court provide relief in accordance with its decision in *Kotteakos*.

II. A SUBSTANTIAL FEDERAL QUESTION

A. Admission of Hearsay Evidence After the Hub of the Conspiracy had been Arrested.

A further reason for reversing the Petitioner's conviction exists because the Sixth Circuit erred in ruling that the conspiracy did not end with the arrest of Franklin Westbrook and the confiscation of the drugs he brought from California. Hearsay conversations that took place after the arrest were admitted improperly over objection by Petitioner (109,110,483,441-442a). These conversations were prejudicial to Petitioner's interest and were the only real evidence linking Petitioner to any possible attempt to make a second, unrelated purchase of narcotics. Without the hearsay evidence, there is only a purchase and an aborted discussion of the possibility of

making a second purchase at a time when such a purchase was impossible. Certainly, no conspiracy conviction should be sustained upon the inferences drawn from hearsay wrongfully admitted into evidence. *Wong Sun* v *U.S.*, 371 US 471, 491.

The question, then, is whether the taped telephone conversations were made during and in furtherance of the conspiracy. Petitioner contends that they could not have been so, because the conspiracy ended when Franklin Westbrook was arrested. This contention is supported by both *Fiswick* v *U.S.*, 329 US 211, and *Krulewitch* v *U.S.*, 336 US 440, 445, where the Supreme Court held that statements made after the arrest of the conspirators could not be used as evidence against their co-conspirators. *Fiswick* v *U.S.*, *supra* at 217.

While it is not always true that the arrest of one conspirator ends the conspiracy, the nature of the conspiracy here charged is such that when Franklin Westbrook was arrested and the drugs confiscated, the whole purpose of that conspiracy was thwarted. Its object had failed. Furthermore, there was no goal of the conspiracy that was being furthered when Franklin Westbrook made telephone calls. If anything, those calls had the seeds of entrapment in them (as did the conversations in Franklin Westbrook's motel room later on). The conversations should not have been admitted against Petitioner.

Since it cannot be said that the conversations were held during and in furtherance of the conspiracy, they can only be admitted in evidence against the participants, Franklin Westbrook, Millard Thompson or Frederick

Hammond. Therefore, the trial court erred in allowing them to be used in evidence against Petitioner, George Hammond. Without that evidence, the Government's case against Petitioner evaporates. There is left no evidence except a purchase and a conversation about a possible purchase which was impossible to consummate, a situation identical to the one in *U.S.* v *Ah Kee Eng.*, 241 F.2d 157 (C.A.2, 1957), where that Circuit held as a matter of law that such evidence in itself, was insufficient to convict the Defendant of conspiracy.

The Sixth Circuit held that since Thompson and Hammond were still able to continue the object of the conspiracy and find a new source of supply that the conspiracy would not end as to them until they were arrested. (App. A, *infra* p.8) For the reasons delineated above, it is clear that this particular conspiracy with this particular source of supply had to come to an end when the so-called hub of the conspiracy, Westbrook, was arrested and turned government informant. There was no evidence to support the theory that any two of the "spokes" would go off together to seek a new and common source of drugs or any other source of drugs.

In like manner, the Trial Court, over Petitioner's objection, admitted into evidence the actual narcotic substance which had been confiscated from Westbrook upon his arrival from California and his arrest at the airport (367a).

In George Hammond's case not a scintilla of evidence demonstrates his prior knowledge of Westbrook's arrival or what he might be bringing. Nor had Petitioner placed any order with anyone for narcotics (23a). The only very slim line of reasoning is that after Westbrook's arrest (when the narcotics had been confiscated and were firmly in the hands of the Government (328a), and Westbrook had made his decision to cooperate with narcotics agents, his telephone calls to Millard Thompson, urging him to

produce purchasers for narcotics he no longer had, were made known to Petitioner by Thompson. Westbrook never had any telephone conversation with George Hammond (231a).

There would appear to be no theory of law, including the co-conspirator exception to the hearsay rule, whereby the confiscated narcotics could become binding on George Hammond. The fact of communication of information to Petitioner that Westbrook had brought narcotics to Detroit and even Petitioner's willingness to buy two ounces (299a), had it been available, cannot attach some retroactive responsibility for the physical exhibits to George Hammond; and, consequently, the admission of the exhibits into evidence was wrongful and highly prejudicial beyond a reasonable doubt.

The Sixth Circuit simply dismissed this claim as having no merit (App. A, *infra*, p.10).

Petitioner prays that this Court either in its supervisory capacity or through its appointed responsibility to protect the constitutional rights of criminal defendants, hold that when a hub of an alleged conspiracy is arrested, turns government informant and, moreover, continues to act as the sole source of supply, that the conspiracy has ended at the point of his arrest and change of allegiance and any evidence thereafter gathered is inadmissible either as hearsay (depending upon its content) or as outside the scope of the conspiracy charged.

CONCLUSION

In reliance on the well-reasoned cases which have evolved in this area dealing with issues before this Honorable Court, it is urged that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,
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APPENDIX A
OPINION

(United States Court of Appeals
— Sixth Circuit)

(United States v. Thompson)

Decided and Filed April 22, 1976

Before: Weick and McCree, Circuit Judges, and Cecil Senior Circuit Judge.

Cecil, Senior Circuit Judge. Millard Philmore Thompson and George Wilbur Hammond, Defendants-Appellants, herein, appeal from their convictions in the United States District Court for the Eastern District of Michigan, Southern Division, on a charge of conspiracy to violate Section 841(a) (1) of Title 21 U.S.C.

The appellants were named in a one count indictment with five other defendants, alleged to be co-conspirators. One Franklin D. Westbrook was named as a co-conspirator but not indicted. It is alleged that the appellants and their co-defendants agreed to knowingly and unlawfully possess with the intention to distribute and to sell and distribute various quantities of heroin and cocaine, controlled Narcotic Drug Substances, Schedules I and II, respectively. The conspiracy is alleged to have extended from February 8, 1974 to February 21, 1974. Overt acts charged against these appellants are:

> "1. On or about February 8, 1974, Millard Thompson placed a telephone call to Franklin D. Westbrook at Los Angeles, California."
>
> "11. On or about February 21, 1974, Millard Thompson, George W. Hammond and Sonja Brown arrived at Room 615 located at the Howard Johnson Motor Inn, Detroit, Michigan;"

The appellants were tried jointly with Frederick J. Hammond and Sonja Brown. Defendant Marian Joan Lewis one of the indicted co-conspirators was dismissed before trial. A mistrial was declared for Frederick J. Hammond in the midst of the trial because of illness. Sonja Brown was convicted but is not included in these appeals.

The issues presented on these appeals are:

(1) whether there was evidence of a conspiracy to possess with the intention of distributing drugs or merely some attempted sales of narcotics and (2) whether certain monitored telephone calls were admissable in evidence.

Franklin D. Westbrook, the unindicted co-conspirator, lived in Los Angeles and on several occasions had brought narcotics to Detroit for illegal distribution and sale. His source of supply was Clarence Allen, also a resident of Los Angeles and one of the indicted co-conspirators. On February 21, 1974, as Westbrook deplaned in Detroit on one of his trips from Los Angeles to distribute narcotics he was arrested by David Cigich, Special Agent of the Drug Enforcement Administration. His luggage was searched and it was found to contain twenty-two pieces (ounces) of heroin and five pieces (ounces) of cocaine. Westbrook agreed to cooperate with the Drug Administration Agents and plans were set up to involve his prospective customers in criminal narcotics violations of the law.

Westbrook was a long time friend of appellant Thompson and had at one time lived in the home with Thompson and his mother. On February 8, 1974, Thompson called Westbrook in Los Angeles and discussed with him the subject of bringing some narcotics to Detroit for distribution. Westbrook went the same day to see Allen and arranged to get a supply of heroin and cocaine to be distributed in Detroit. Following this a "runner" for Allen brought to Westbrook's apartment twenty-two pieces of heroin and five pieces of cocaine.

Then on or about February 12th. Westbrook flew to Detroit with a quantity of narcotics for distribution. It is not quite clear from the evidence whether he had ten pieces of heroin or the twenty-two pieces of heroin and five pieces of cocaine he had received from Allen's runner. Upon his arrival in Detroit he checked into the Caribe Motel on Woodward Avenue. He contacted George Lowry, one of the indicted co-conspirators who came over and got one ounce of heroin.

On Saturday morning of the week of this trip Westbrook called Thompson and told him he was in town. He then took a cab and met Thompson at his residence. Thompson telephoned appellant George Hammond who came to the Thompson residence and purchased some heroin. Hammond on this occasion purchased two or three pieces of heroin from Westbrook for which he paid $1000 each and then left.

After George Hammond left, Thompson and Westbrook left in a car in search of Frederick Hammond another prospective customer and an indicted co-conspirator. They found him in his automobile, along with George Lowry, on Maplewood near Grand River Ave. All four men proceeded to Fred Hammond's apartment where Westbrook sold him five or six pieces of heroin for approximately six thousand dollars. Westbrook went back to Los Angeles on Sunday evening.

On his return to Los Angeles he had approximately $11000 which he took to co-conspirator Clarence Allen and received his "payoff" of one thousand dollars. On Monday or Tuesday evening following this return Westbrook had a telephone call from Fred Hammond. The substance of this conversation was that he wanted to deal directly with Westbrook and did not want to be involved with George Lowery as a third party. He also

wanted to know when he would return to Detroit and urged him to bring as much (drugs) as he could. It is noted that the trial judge sustained an objection to this conversation as to George Hammond.

Westbrook also had a telephone call from Thompson at about the same time in which Thompson indicated that he was interested in some drugs. The trial judge overruled objections to this conversation on behalf of the Hammonds but maintained his ruling as to Sonja Brown. After these phone calls, Westbrook went to Clarence Allen's house and discussed with him the amount of drugs he had available for another trip to Detroit. He had twenty-two pieces of heroin and five pieces of cocaine. The trial judge admitted this conversation without limitation.

Westbrook flew to Detroit with this quantity of drugs and arrived there on the morning of February 20 or 21st. On his arrival in Detroit he was arrested as has been previously stated. Upon his arrest he made telephone calls to Thompson and Fred Hammond to tell them that he was in town and had some drugs for distribution. These calls were monitored by Special Agents of the Drug Administration. Westbrook checked into the Howard Johnson Motel and made further monitored calls to Thompson and Fred Hammond. In these calls he told them where he was and told them to come on down.

Objections were made on behalf of the Hammonds and Thompson to the admission of the conversations on these telephone calls. The trial judge overruled these objections and held that at this point there was evidence of a conspiracy between the Hammonds, Thompson and Westbrook. He held that the transactions Westbrook had with the Hammonds on his visit of February 13th, with the aid of Thompson, was evidence from which an agreement to violate the narcotic laws could be inferred.

As a result of these telephone conversations two groups of persons came to the Motel to meet Westbrook. Joe Gordon, a Special Agent of the Drug Enforcement Administration was in the room with Westbrook as he interviewed these groups of people. He was introduced as one traveling with Westbrook because he was carrying large amounts of drugs and he needed someone to back him up. There were also Special Agents of the Drug Administration in a room adjoining the room in which Westbrook was located.

The first prospective customers to visit Westbrook in the Motel were Fred Hammond and his friend Marian Lewis, an indicted co-conspirator. A discussion, in which Joe Gordon participated, was had concerning the purchase of drugs, the price and the quality, etc. Westbrook's supply had been confiscated and there were no drugs for actual sale. When Hammond was committed to make a purchase, Joe Gordon left the room and the agents from the adjoining room came in and arrested Hammond, his friend Lewis and also Westbrook. Following the visit of this first group Thompson, George Hammond and Sonja Brown came to the motel. The conversation proceeded with each one participating concerning the purchase of narcotics, the price, the quality, etc. Joe Gordon also entered into the discussion. When these prospective customers were committed to sales Joe Gordon left the room on the pretense of getting the drugs. The Agents in the adjoining room moved in. arrested the three customers and confiscated the money.

The question thus presented on these facts is whether there is evidence, considered in its light most favorable to the government[1] from which the jury could find the existence of a conspiracy agreement. It is for the jury to determine whether this evidence meets the requirement of proof beyond a reasonable doubt.

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[1] *Glasser* v. *United States*, 315 U.S. 60.

The essential elements of conspiracy are:

1. The conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged;

2. The accused willfully became a member of the conspiracy;

3. One of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and

4. Such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

Bradford v. *United States*, 413 F.2d 467, 470 (5th Cir.), *United States* v. *Friedman*, 445 F.2d 1076, 1084 (9th Cir.) cert den., sub nom *United States* v. *Jacobs*, 404 U.S. 958. See also *United States* v. *Bostic*, 480 F2d 965, 968 (6th Cir.).

The existence of a criminal conspiracy need not be proven by direct evidence, a common plan may be inferred from circumstantial evidence. *Glasser* v. *United States, supra. United States* v. *Luxenberg*, 374 F2d 241, 250 (6th Cir.) *United States* v. *Levinson*, 405 F2d 971, 985 (6th Cir.) cert. den. 395 U.S. 958, No. 75-1865, *United States* v. *Paul Norton Van Hee*, (6th Cir.) Feb. 23, 1976. The trial judge correctly instructed the jury on the law of conspiracy and no issue is presented concerning the instructions to the jury.

Section 841 (a) (1) 21 U.S.C. the subject of this conspiracy charge, so far as applicable to this case reads as follows:

"(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally* * *

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance;* * *"

Section 846, 21 U.S.C. defines the crime of conspiracy as "any person who attempts or conspires to commit any offense defined in this title* * *."

The evidence of Thompson's call to Westbrook in Los Angeles on February eighth with reference to bringing narcotics to Detroit for distribution and sale is not in dispute and is proof of one of the overt acts charged in the indictment. As indicated in the statement of facts herein Westbrook came to Detroit in response to this call and with Thompson's assistance had transactions of drug sales with George and Fred Hammond.

We conclude from these transactions, as did the trial judge, that there was sufficient evidence from which the jury could infer and find beyond a reasonable doubt that there was an agreement on the part of these appellants to violate Section 841 (a) (1), 21 U.S.C. Clearly, the object of the agreement was to sell and distribute drugs, controlled substances, in the Detroit area, illegally. The appellants were willing participants in the concerted plan of operation and performed acts in furtherance of its accomplishment.

Both of the appellants, herein, claim that the conspiracy, if any existed, came to an end with the arrest of Westbrook and that the trial judge erred in admitting into evidence the monitored telephone conversations between Westbrook and Thompson.

The trial judge ruled that up to the point of the arrest of Westbrook there was sufficient evidence from which the jury could find beyond a reasonable doubt that there was a conspiracy. In reference to the monitored tele-

phone conversations he held that while the general rule was that the arrest of a conspirator terminated the conspiracy, it did not apply to Thompson and Hammond in this case. They were still able to continue the object of the conspiracy and the conspiracy would not end as to them until they were arrested. Their practice and business of selling narcotics on the street did not depend on Westbrook for their supplies and there is no reason to believe that they would not have found another source of supply.

In *United States* v. *Register*, 496 F.2d 1072, 1079 (5th Cir) cert. den. 419 U.S. 1120 the court said:

> "* * *if co-conspirators still at large are fully capable of perpetuating an on-going conspiracy, it is entirely possible that they or their arrested brethren may make statements intended to further effectuate the conspiracy."

See also *United States* v. *Sarno*, 456 F.2d 875, 878.

> "* * *the termination of a conspiracy generally is an issue to be determined on the facts of the individual case, and we know of no per se rule that the arrest of one conspirator automatically terminates the conspiracy. (Citations omitted). It may frustrate it, or cause the remaining conspirators to abandon it, but where the plot is an ongoing one which is capable of being carried out in the absence of the apprehended party, his arrest no more terminates the conspiracy than would his withdrawal, incapacitation or death. In the instant case, the conspirators were capable of carrying out their scheme without Taft."

In *United States* v. *Cohen*, 197 F.2d 26, 29 (3rd Cir), the court found that the fact of an arrested conspirator making contracts with other conspirators under the

direction and surveillance of government agents to obtain evidence against the co-conspirators did not terminate the conspiracy or change the status of the remaining members.

The trial judge instructed the jury with reference to statements made by a member of the conspiracy as follows:

> "* * *whenever you find beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was a member of the conspiracy, then the statements thereafter knowingly made and the actions thereafter knowingly done by any person who likewise is found to be a member of the conspiracy may be considered by the jury as evidence in the case as to the defendant found to be a member, even though the statements and actions may have occurred in the absence and without the knowledge of the defendant, provided such statements and actions were knowingly and done during the continuance of the conspiracy and in furtherance of some object or purpose of the conspiracy."
>
> * * *
>
> "Therefore, statements of any conspirator which are not in furtherance of a conspiracy or made before its existence or after it terminates may be considered as evidence only against the person making it."

The trial judge properly defined conspiracy for the jury and left it to the jury to determine as a fact whether or not there was a conspiracy and if so the duration of its existence. He also properly instructed the jury on the admissibility in evidence of statements made by one of the conspirators.

We conclude that the monitored telephone conversations were properly admitted in evidence on the theory that the arrest of Westbrook did not per se terminate the conspiracy as to the appellants herein.

Counsel for appellant Hammond claims that the court erred in introducing into evidence as an exhibit the drugs that were seized from Westbrook at the time of his arrest. We find no merit to this claim.

The judgment of the District Court in finding the appellants guilty as charged in the indictment is AFFIRMED.

Supreme Court, U. S.
FILED
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Nos. 75-1847 and 76-5178

In the Supreme Court of the United States

OCTOBER TERM, 1976

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v.

UNITED STATES OF AMERICA

MILLARD FILMORE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-26)[1] is reported at 533 F. 2d 1006.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1976. On May 21, 1976 Mr. Justice Stewart extended the time for the filing of a petition for a writ of

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[1]All citations to the court of appeals' opinion refer to the appendix in No. 75-1847.

certiorari in No. 75-1847 to and including June 21, 1976. That petition was not filed until June 22, 1976, and the petition in No. 76-5178 was not filed until August 6, 1976; therefore, both petitions are out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence showed the existence of a single narcotics conspiracy as charged in the indictment.

2. Whether the evidence was sufficient to support the jury's finding that petitioners were members of the conspiracy.

3. Whether evidence of monitored telephone calls in furtherance of the conspiracy, made after an unindicted co-conspirator was arrested, was inadmissible on the ground that the arrest ended the conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiracy to possess heroin and cocaine with intent to distribute, in violation of 21 U.S.C. 846. Petitioner Hammond was sentenced to 18 months' imprisonment, to be followed by three years' special parole; petitioner Thompson was sentenced to 18 months' imprisonment, to be followed by one year's special parole. The court of appeals affirmed (Pet. App. 17-26).[2]

As set forth in the opinion of the court of appeals (Pet. App. 18-21), the evidence showed that petitioners and five indicted co-conspirators were involved in an illegal

[2]One other co-defendant also was convicted at petitioner's trial. Charges against another co-defendant were severed during that trial due to his illness; he was later tried separately and convicted.

scheme to transport, deliver, and distribute heroin and cocaine in the Detroit metropolitan area.

To establish petitioners' and others' roles in the conspiracy, the government relied primarily on the testimony of Franklin D. Westbrook, an unindicted co-conspirator. On February 21, 1974, federal agents arrested Westbrook at the Detroit Metropolitan Airport minutes after his arrival from Los Angeles (Tr. 70-72, 344-345). Westbrook consented to a search of his luggage, which was found to contain large quantities of heroin and cocaine (Tr. 38-39, 346-347, 363-365, 375-377). He later agreed to cooperate with the government in obtaining evidence against others involved in the conspiracy (Tr. 205-206, 257-259, 348).

Westbrook testified at trial that on February 8, 1974, he received a telephone call in Los Angeles from petitioner Thompson in Detroit. Petitioner Thompson, a long time friend with whom Westbrook had once lived, expressed an interest in obtaining narcotics (Tr. 30-35). After receiving the call, Westbrook went to the residence of Clarence Allen, his "connection," to secure a supply of heroin and cocaine (Tr. 35). The drugs were later delivered to Westbrook by a "runner" who worked for Allen (Tr. 37, 40).

On or about February 12, 1974, Westbrook flew to Detroit with a quantity of narcotics for distribution. After checking into a motel, he contacted George Lowry, who came to the motel and purchased an ounce of heroin (Tr. 42-43, 162). Thereafter Westbrook called petitioner Thompson to advise him of his arrival. Petitioner Thompson stated that he wished to purchase two or three ounces of heroin. They arranged a meeting, and Westbrook went to petitioner Thompson's residence "[t]o distribute narcotics" (Tr. 43-46, 50, 172). Petitioner Thompson made a telephone call, and petitioner Hammond,

whom Westbrook knew as "Bo," arrived shortly thereafter, purchased two or three ounces of heroin for $1,000 an ounce, and left (Tr. 48-52).

After a further sale to one Fred Hammond, Westbrook returned to Los Angeles with $11,000, which he delivered to Allen; he received a $1,000 "payoff" for his role in the transactions (Tr. 53-55, 60-61).

Approximately a week later, Westbrook received another call from petitioner Thompson. During the ensuing conversation, petitioner Thompson expressed an interest in making a purchase of drugs and indicated that he might come to Los Angeles (Tr. 64-65). Westbrook then went to Allen's home and advised that he had received calls from Detroit and could "possibly turn over a large amount of drugs" (Tr. 65-66). Allen said he had 22 ounces of heroin and five ounces of cocaine available, and Westbrook explained how the deliveries were to occur in Detroit (Tr. 67).

After arranging to be met at the airport, Westbrook flew to Detroit with the 22 ounces of heroin and five ounces of cocaine (Tr. 70). He was arrested at the airport by federal agents, and the narcotics were seized (Tr. 72). In co-operation with the government, Westbrook contacted the individuals to whom the narcotics were to be delivered. He placed telephone calls to petitioner Thompson and Fred Hammond, which, with Westbrook's permission, were monitored and recorded by Drug Enforcement Administration agents (Tr. 74-76, 89-90, 290).

During a recorded conversation[3] between petitioner Thompson and Westbrook, petitioner Thompson indicated that he was preparing everyone to complete the

[3]The district court overruled petitioners' objections to the admission of the conversations, holding that at that point there was sufficient evidence of a conspiracy between the Hammonds, petitioner Thompson, and Westbrook (Tr. 431-432).

transactions. He stated that "Fred" (Hammond), "Bo" (petitioner Hammond), and "Sonja" (Brown) were "ready to get down." Petitioner Thompson advised that petitioner Hammond and his brother would be able to handle "the same thing that [they] got before, or more" (App. 152b-159b).[4]

Thereafter, Fred Hammond and Marian Lewis visited Westbrook and undercover agent Joe Gordon in the motel room Westbrook had rented. Hammond and Westbrook discussed the price and quality of the drugs the latter had. When Hammond was committed to a purchase, Gordon gave a pre-arranged signal to agents in the adjoining room, who arrested Hammond and Lewis (Tr. 292, 295).

In another telephone conversation with Westbrook, petitioner Thompson advised that he had spoken with petitioner Hammond, who wanted "something right now" (App. 164b-166b). Petitioners and Sonja Brown later arrived at the motel (Tr. 297). Petitioner Hammond complained of the quality of heroin received in his previous transaction with Westbrook, expressed his desire to buy two ounces for the present, and indicated that he would buy more when he had disposed of the two ounces (Tr. 298-300). Brown also negotiated a purchase (Tr. 300-301). When the signal was given, agents in the adjoining room made the arrests (Tr. 302). Twenty-four hundred dollars were found and seized in the incidental search of petitioner Hammond (Tr. 383).

ARGUMENT

1. Petitioners contend (No. 75-1847, Pet. 11-13; No. 76-5178, Pet. 14-18) that the evidence showed multiple conspiracies rather than a single conspiracy as charged in the indictment and that therefore there was a fatal variance between the indictment and the proof.

[4]"App." refers to the government's Appendix in the court of appeals.

The test for determining whether the evidence establishes a single conspiracy is " 'whether there is a common purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is concerted action to achieve this end.' " *Koolish* v. *United States*, 340 F. 2d 513, 524 (C.A. 8), certiorari denied, 381 U.S. 951. The crucial question is whether the alleged conspirators had "knowledge of the plan's general scope, if not its exact limits, [and] sought a common end." *Blumenthal* v. *United States*, 332 U.S. 539, 559. See also *United States* v. *Cirillo*, 499 F. 2d 872, 887 (C.A. 2), certiorari denied, 419 U.S. 1056; *United States* v. *Perez*, 489 F. 2d 51, 61-62 (C.A. 5), certiorari denied, 417 U.S. 945.

The evidence fully supported the jury's findings concerning the existence of a single conspiracy in this case. As the court of appeals correctly concluded, the evidence, when viewed in the light most favorable to the government, established beyond a reasonable doubt that there was an agreement "to sell and distribute drugs, controlled substances, in the Detroit area, illegally" (Pet. App. 23). Allen was supplying heroin and cocaine to Westbrook; the latter then arranged to sell the narcotics to Brown, Lowry, Fred Hammond, and petitioners, for further sale and distribution in Detroit. The jury thus could properly find that there was one overall agreement among the various parties to perform different functions in order to carry out the single objective.[5] See *United*

[5]*Kotteakos* v. *United States*, 328 U.S. 750, upon which petitioners primarily rely, is inapposite. There, the evidence proved eight or more different conspiracies by separate groups of defendants which had no connection with each other; the court gave no multiple conspiracy instruction but instructed the jury that the acts and declarations of one conspirator bound all. Here, by contrast, the court gave both an adequate instruction on the law of multiple conspiracies (Tr. 562) and a cautionary instruction (Tr. 560) that only the acts and declarations of each defendant were to be considered in determining whether each was a member of the conspiracy, thereby properly submitting both issues to the jury.

States v. *Bastone*, 526 F. 2d 971, 979-980 (C.A. 7), certiorari denied, No. 75-1239, May 19, 1976; *United States* v. *Steinberg*, 525 F. 2d 1126, 1133 (C.A. 2), certiorari denied, No. 75-1040, May 19, 1976; *Poliafico* v. *United States*, 237 F. 2d 97, 103-104 (C.A. 6), certiorari denied, 352 U.S. 1025.

2. Petitioners' argument (No. 75-1847, Pet. 7-10; No. 76-5178, Pet. 6-14) that the evidence was insufficient to sustain their convictions is insubstantial.[6] As shown above, the evidence established a conspiratorial scheme whereby Westbrook received his supply in Los Angeles and through petitioner Thompson arranged the distribution to retailers in Detroit, including petitioner Thompson.[7] Petitioner Thompson was instrumental in making the arrangements for the sales of heroin. His February 8, 1974, telephone call to Westbrook precipitated Westbrook's initial trip to Detroit, during which petitioner Thompson arranged a meeting between petitioner Hammond and Westbrook. At that time, petitioner Hammond purchased two ounces of heroin from Westbrook. Petitioner Thompson also assisted Westbrook in the sale of heroin to Fred Hammond. After Westbrook's return to Los Angeles, petitioner Thompson again telephoned him, indicated his desire to buy drugs,

[6]Petitioner Hammond's contention (No. 75-1847, Pet. 7-10) that there was no direct evidence to establish his participation in the conspiracy and that his conviction was therefore based upon "impermissible pyramiding of inferences" (No. 75-1847, Pet. 8) is in reality no more than a challenge to the sufficiency of the evidence.

[7]Once the conspiracy is established, "slight evidence" may be sufficient to connect individual conspirators thereto. *United States* v. *Edwards*, 488 F. 2d 1154, 1157 (C.A. 5); *United States* v. *Marrapese*, 486 F. 2d 918, 921 (C.A. 2), certiorari denied, 415 U.S. 994; *United States* v. *Nunez*, 483 F. 2d 453, 460 (C.A. 9), certiorari denied, 414 U.S. 1076. Here, the evidence connecting Thompson to the conspiracy was strong.

and mentioned the possibility of traveling to Los Angeles for that purpose. On February 21, 1974, at a second meeting arranged by petitioner Thompson, petitioner Hammond agreed to buy two more ounces of heroin and indicated that he would buy more in the future. When arrested, petitioner Hammond was carrying $2,400. The recorded telephone conversations between petitioner Thompson and Westbrook further confirmed petitioners' participation in the conspiracy. Viewed in the light most favorable to the government, the evidence was, as the court of appeals properly held, sufficient to prove that petitioners were "willing participants in the concerted plan of operation and performed acts in furtherance of its accomplishment" (Pet. App. 23).[8]

3. Finally, petitioners assert (No. 75-1847, Pet. 13-16; No. 76-5178, Pet. 19-22) that the conspiracy, if any existed, ended with the arrest of Westbrook and that the district court erred in admitting into evidence the monitored telephone conversations between Westbrook and petitioner Thompson. This contention is frivolous. Although the arrest of one conspirator may terminate his role in the conspiracy and render his extra-judicial statements inadmissible against co-conspirators (*Fiswick* v. *United States*, 329 U.S. 211, 217), it does not *per se* end the conspiracy or change the status of the remaining members. *United States* v. *Sarno*, 456 F. 2d 875, 878 (C.A. 1); *United*

[8]Petitioner Hammond's contention (No. 75-1847, Pet. 7-9) that due process is violated by allowing the government to prove elements of the crime of conspiracy through circumstantial evidence and inferences from facts in evidence is clearly without merit. Whether the evidence is direct or circumstantial, the jury must use its experience to weigh the probabilities and determine guilt beyond a reasonable doubt. *Holland* v. *United States*, 348 U.S. 121, 140. Moreover, the court gave proper instructions on the standards for reasonable doubt (Tr. 543-546) and the law concerning circumstantial evidence (Tr. 566-567).

States v. *Cohen*, 197 F. 2d 26, 29 (C.A. 3). The termination of a conspiracy is generally a question of fact to be determined from the circumstances of the case.[9] *United States* v. *Sarno*, *supra*, 456 F. 2d at 878. If co-conspirators remain at large, fully capable of perpetuating the conspiracy, hearsay statements made by them in furtherance of the illegal agreement are admissible. *United States* v. *Register*, 496 F. 2d 1072, 1079 (C.A. 5), certiorari denied *sub nom. Cochran* v. *United States*, 419 U.S. 1120.

It is clear from the evidence that statements made by petitioner Thompson during his recorded conversations with Westbrook were made in furtherance of the conspiracy. Petitioner Thompson was unaware of Westbrook's arrest and unquestionably intended to perpetuate the ongoing illicit agreement.[10] As the court of appeals correctly concluded (Pet. App. 26), the arrest of Westbrook did not terminate the conspiracy, and the conversations were properly admitted.[11]

[9]The court properly submitted this issue to the jury (Pet. App. 25; Tr. 560-561).

[10]Contrary to petitioner Hammond's contentions, the instant case is not in conflict with *Krulewitch* v. *United States*, 336 U.S. 440, and *Fiswick* v. *United States*, *supra*. In *Fiswick*, this Court held that confessions and admissions made by an arrested conspirator are not made in furtherance of the conspiracy and are therefore inadmissible against co-conspirators. This Court in *Krulewitch* held that hearsay statements made in furtherance of a post-conspiracy understanding to conceal the conspiracy are not admissible. The recorded conversations between Westbrook and petitioner Thompson were clearly not confessions or admissions made by an arrested conspirator, nor were they made in the concealment phase of a terminated conspiracy.

[11]Indeed, the conversations were admissible against petitioner Thompson as his own admissions; thus, their admissibility need not be upheld solely on the basis of the co-conspirator exception to the hearsay rule.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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